

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Targeting and Eliminating Unlawful Text)
Messages) CG Docket No. 21-402
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)

Relating to the
Report and Order and Further Notice of Proposed Rulemaking
Issued March 17, 2023

Comments of

National Consumer Law Center, on behalf of its low-income clients, and

Appleseed
Consumer Action
Consumer Federation of America
Electronic Privacy Information Center
National Association of State Utility Consumer Advocates
National Consumers League
Public Citizen
Public Knowledge
U.S. PIRG

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Reply Comments

I. Introduction and Summary.

The **National Consumer Law Center** (NCLC), on behalf of its low-income clients, files these Reply Comments along with **Appleseed, Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of State Utility Consumer Advocates, National Consumers League, Public Citizen, Public Knowledge, and U.S. PIRG**, regarding the issues raised in the Report and Order and Further Notice of Public Rulemaking (FNPRM) regarding “Targeting and Eliminating Unlawful Text Messages” issued on March 17, 2023.¹ These Reply Comments are in support of the Comments we previously filed on May 8 regarding these issues,² and are provided only to respond to the points raised by other commenters in this docket.

As we explained in our main Comments, we are urging the Federal Communications Commission (Commission or FCC) *not* to proceed with its proposed changes to its regulations regarding consent for prerecorded telemarketing calls, as that proposal would be a reduction in consumer protections from the current regulations. In **section II, *infra***, we explain how the **current TCPA regulations, when combined with those imposed on the same calls by the Federal Trade Commission’s (FTC) Telemarketing Sales Rule (TSR), already place meaningful restrictions on the ways that callers can make these calls legally**. As requested in our Comments, we urge the FCC to issue guidance reiterating the requirements in its current regulations, along with a reminder that the federal E-Sign law applies whenever writings or signatures are provided electronically.

There are many comments in this docket expressing hyperbolic concerns that the Commission’s consideration of ways to limit the sharing of consent agreements among telemarketers and sellers will be the end of the lead generation industry, hurting consumers and businesses.

¹ *In re* Targeting and Eliminating Unlawful Text Messages Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order and Further Notice of Proposed Rulemaking, CG Docket Nos. 21-402, 02-278 (Rel. Mar. 17, 2023), *available at* <https://www.fcc.gov/document/fcc-adopts-its-first-rules-focused-scam-texting-0>. The Proposed Rule was published in the Federal Register at 88 Fed. Reg. 20,800 (Apr. 7, 2023) and is available at <https://www.govinfo.gov/content/pkg/FR-2023-04-07/pdf/2023-07069.pdf>.

² *In re* Targeting and Eliminating Unlawful Text Messages Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Comments of National Consumer Law Center *et al.*, CG Docket Nos. 21-402, 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/1050859496645/1>

As we explain in **section III**, *infra*, requiring compliance with the *existing* regulations will not eliminate the role that lead generators play in pointing consumers to sales and services online. **Compliance will only limit the extent to which lead generators can ask consumers to consent to receive telemarketing calls from multiple sellers and then share or sell that consent.** As many commenters note, the sharing of telemarketing consents is a primary cause of the explosion of telemarketing calls in recent years. Yes, enforcing the existing rules will reduce unwanted telemarketing calls. However, as representatives of a broad swath of American telephone users, we are absolutely certain that no consumers will complain about receiving fewer of these calls. There are multiple alternative ways for these sellers to reach consumers, or for consumers to reach sellers.

II. The Commission should issue guidance confirming that its current regulations limit agreements for prior express consent and prior express invitation to calls from one seller, and that the E-Sign Act applies to agreements entered online.

A. Despite routinized non-compliance by the telemarketing industry, the rules governing consent for telemarketing calls clearly require that the agreements be entered into between the seller and the consumer and prohibit their transfer between parties.

The requirements for consent and invitation in the current regulations issued by the Commission pursuant to the Telephone Consumer Protection Act (TCPA) are quite specific, and they have been the law for a long time.³ The current regulations prohibit telemarketing calls to a line registered on the Do Not Call Registry (DNC) unless the telemarketer has a “personal relationship with the recipient” or the caller has the subscriber’s prior express invitation or permission. The rule specifies:

Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this

³ The Commission’s regulation governing consent for calls to DNC lines were promulgated in 2003. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, Final Rule, CG Docket No. 02-278, 68 Fed. Reg. 44,144, 44,148 ¶ 22 (F.C.C. July 25, 2003) (“Consistent with the FTC’s determination, we conclude that for purposes of the national do-not-call list such express permission must be evidenced only by a signed, written agreement between the consumer and the seller which states that the consumer agrees to be contacted by this seller, including the telephone number to which the calls may be placed.” (emphasis added)). The regulations requiring prior express written consent for prerecorded telemarketing calls to residential lines and cell phones were promulgated in 2012. *In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, Docket No. 02-278, 27 F.C.C. Rcd. 1830, 1873 ¶ 28 (F.C.C. Feb. 15, 2012).

seller and includes the telephone number to which the calls may be placed; . . .⁴

The critical language in this regulation is a) the agreement must be “between the consumer and seller,” and b) it must specify that the consumer agrees to be contacted by “this seller.” As each agreement must be between the seller and the consumer, and each agreement must be limited to the calls from that seller, the FCC’s regulation clearly prohibits any agreement from providing consent to more than one seller or consent that can be transferred to another seller.

Similarly, the FCC’s rules for prerecorded telemarketing calls to cell phones and residential lines requires prior express written consent,⁵ which the current regulations define in 47 C.F.R. § 64.1200(f)(9) as:

(9) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice;⁶

Unlike the requirements for prior express invitation under 47 C.F.R. § 64.1200(c)(2)(ii) for calls to DNC lines, this regulation does not explicitly require that the agreement be between the person to be called and the seller. But the references to “the seller” make it clear that the agreement can permit calls from only one seller.

Thus, both of the written consent provisions of the FCC’s rules are explicit in allowing consent to be given to receive calls only from a single identified seller. But if there were any ambiguity, the FCC’s rule should be interpreted to be consistent with the parallel provisions of the Federal Trade Commission’s (FTC) Telemarketing Sales Rule (TSR).⁷ Congress has instructed the

⁴ 47 C.F.R. § 64.1200(c)(2)(ii) (emphasis added).

⁵ 47 C.F.R. § 64.1200(a)(3).

⁶ 47 C.F.R. § 64.1200(f)(9) (emphasis added).

⁷ 16 C.F.R. §§ 310.1 *et seq.*

Commission to maximize consistency with the FTC's rules,⁸ and even without a congressional directive it is obvious that inconsistent rules governing the same activity would be problematic.

With respect to prerecorded calls, the TSR declares:

It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in the following conduct:

...

(v) Initiating any outbound telephone call that delivers a prerecorded message, . . . unless:

(A) In any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

- (i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;
- (ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;
- (iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and
- (iv) Includes such person's telephone number and signature; . . .⁹

The TSR's requirement that "the seller" obtain the consumer's consent, and that the consent allows delivery of prerecorded messages "by or on behalf of a specific seller," make it clear that a third party that is not the seller's agent cannot obtain the consumer's consent, and that consent cannot be sold or transferred. And the FTC has explicitly reiterated this point in its Business Guidance,¹⁰ which explains:

May a seller obtain a consumer's written permission to receive prerecorded messages from a third-party, such as a lead generator? No. The TSR requires the seller to obtain permission directly from the recipient of the call. The seller cannot rely on third-parties to obtain permission.

To confirm what the FCC's regulations have said for the past twenty years, and to show consistency with the FTC's rule, the FCC should similarly issue guidance that the seller cannot obtain consent by

⁸ The Do-Not-Call Implementation Act, Pub. L. No. 108-10, § 3, 117 Stat. 557 (2003).

⁹ 16 C.F.R. § 310.4(b)(1)(v) (emphasis added).

¹⁰ Federal Trade Comm'n, Business Guidance, Complying with the Telemarketing Sales Rule, *available at* <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule#prerecordedmessages>.

purchasing it from, or obtaining a referral from, a lead generator, another seller, or an independent contractor.

The FTC's rule about calls to a consumer whose telephone number is registered on the DNC list is phrased in a very similar way. It allows calls to such a consumer if:

[T]he seller:

(i) Can demonstrate that the seller has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person.¹¹

The references to “the seller has obtained” and to calls “by or on behalf of a specific party” echo the key language of the FTC's rule about consent to receive prerecorded calls, and make it equally clear that the seller itself must obtain the consumer's consent.

The TCPA and TSR regulations regarding how consent for prerecorded calls and calls to consumers on the DNC list can be legally obtained are clear and have been on the books for a long time. Yet, the telemarketing and lead generating industries have routinized their lack of compliance to such an extent that they are claiming that their current way of doing business *should be* the rule. To remove any doubt as to what the rule is and continues to be, the FCC should correct this huge and deliberate misinterpretation of its longstanding rules by issuing a guidance like that issued by the FTC.

B. Although few parties comply, the federal E-Sign Act applies when signatures are provided electronically, and when electronic records are used to satisfy requirements for a writing.

As explained in our primary Comments, the federal Electronic Signatures in Global and National Commerce Act (the E-Sign Act) establishes the rules for satisfying a requirement for a writing or a signature with their electronic equivalents.¹² It is only because of the E-Sign Act that an electronic action like a click on a website can carry the same legal significance as a “wet” signature.¹³ As a result, an electronic click used by a telemarketer to signify a person's signature on an agreement providing express consent or invitation to receive telemarketing calls under either the TCPA

¹¹ 16 C.F.R. § 310.4(b)(1)(iii)(B)(i) (emphasis added).

¹² 15 U.S.C. §§ 7001 *et seq.*

¹³ 15 U.S.C. § 7001(a)(2) (emphasis added).

regulations or the TSR will qualify as a signature that can bind the person to the agreement only if that click meets the definition of an electronic signature in the E-Sign Act at 15 U.S.C. § 7006(5). Among other things, this definition requires that the signer have the intent to sign the electronic record.¹⁴ When the agreement is to provide consent for telemarketing calls, the place on the electronic form where the electronic action is to be applied must clearly indicate that the consumer, by taking the electronic action, is intending to sign the related electronic agreement to receive those calls. An electronic sound, symbol, or process applied on a website that is hyperlinked to a list of multiple other parties from whom the person is purportedly agreeing to receive calls could not indicate consent by the person applying the click, because the person would not have had the required intent to sign an agreement with all of the callers included in the hyperlinked list. As the Commission held in a recent order against a lead generator:

The websites included TCPA consent disclosures whereby the consumer agreed to receive robocalls from “marketing partners.” These ‘marketing partners’ would only be visible to the consumer if the consumer clicked on a specific hyperlink to a second website that contained the names of each of 5,329 entities. We find that listing more than 5,000 “marketing partners” on a secondary website is not sufficient to demonstrate that the called parties consented to the calls from any one of these “marketing partners.”¹⁵

Additionally, if a statute, regulation, or other rule of law requires information relating to a transaction to be given to a consumer in writing, the E-Sign Act allows it to be provided electronically only if various specified requirements, designed to ensure that the consumer understands the implications of giving up the benefits of a writing, are first met.¹⁶ Since both the TCPA and the TSR regulations for consent to receive telemarketing or prerecorded calls, quoted in section II(A), *supra*, require that a written agreement containing specific disclosures be provided to

¹⁴ 15 U.S.C. § 7006(5) (The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” (emphasis added)).

¹⁵ *See, e.g.,* Federal Commc’ns Comm’n, *In re Urth Access, Inc.*, Order, File No. EB-TCD-22-00034232, 2022 WL 17550566, at ¶ 16 (Rel. Dec. 8, 2022), *available at* <https://www.fcc.gov/document/fcc-orders-voice-service-providers-block-student-loan-robocalls> (“The websites included TCPA consent disclosures whereby the consumer agreed to receive robocalls from ‘marketing partners.’ These ‘marketing partners’ would only be visible to the consumer if the consumer clicked on a specific hyperlink to a second website that contained the names of each of 5,329 entities. We find that listing more than 5,000 ‘marketing partners’ on a secondary website is not sufficient to demonstrate that the called parties consented to the calls from any one of these ‘marketing partners.’” (footnote omitted)).

¹⁶ 15 U.S.C. § 7001(c)(1).

the consumer, these E-Sign Act requirements apply. Yet it appears that no solicitations of consent for telemarketing calls even pretend to comply with these requirements. If the E-Sign Act’s requirements are not followed, then the lead generator’s electronic provision of the information that the FCC and FTC rules require to be given to the consumer in writing is of no effect, the consumer’s supposed consent to receive the calls is invalid, and any calls made based on that consent are illegal.

Compliance with the E-Sign Act’s consent process is not optional. As we explained in our primary comments, in 15 U.S.C. § 7004(d)(1), Congress explicitly limited the ability of federal regulatory agencies to avoid the E-Sign Act consent process. An agency is permitted to do so only if it makes an affirmative finding that jettisoning the consent process “is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.” Such a finding would not be possible for the FCC to make. The E-Sign Act consent process provides a critical protection for consumers in electronic transactions.

The FCC should issue guidance clarifying that the rules of the federal E-Sign Act apply whenever agreements consenting to telemarketing calls are entered into online.

III. Insisting on compliance with current TCPA regulations will significantly reduce the number of unwanted telemarketing calls by limiting the sale and sharing of consents by lead generators; all other activities will be unaffected.

A. Longstanding and routinized flouting of current regulations does not justify continuing to allow telemarketers to ignore the clear intent of the Commission’s regulations.

The fact that lead generators and their telemarketing customers have been ignoring the requirements of the Commission’s regulations on telemarketing calls—and getting away with it for many years—is not a reason to allow that behavior to continue. As the Commission has repeatedly recognized, it is largely because of too many robocalls that the use of the telephone has declined in recent years.¹⁷ Contrary to the assertions made by these members of the telemarketing industry,

¹⁷ See, e.g., *In re Advanced Methods to Target and Eliminate Unlawful Robocalls and Call Authentication Trust Anchor*, Seventh Report and Order in CG Docket 17-59 and WC Docket 17-97, Eighth Further Notice of Proposed Rulemaking in CG Docket 17-59, and Third Notice of Inquiry in CG Docket 17-59, CG Docket No. 17-59 and WC Docket No. 17-97, at ¶ 1 (Rel. Apr. 27, 2023), *available at* <https://docs.fcc.gov/public/attachments/DOC-392975A1.pdf> (“Many of us no longer answer calls from unknown numbers and, when we do, all too often find them annoying, harassing, and possibly fraudulent.”)

limiting the ability to use a consumer’s single agreement of consent to justify multiple calls from different telemarketers will stop a large number of unwanted telemarketing calls, as only a tiny fraction of the consents previously used to justify the calls will meet the requirements. Moreover, while requiring this industry to comply with regulations that have been on the books for over a decade may force a change in its practices, such a change will provide significant benefits to consumers.

We do not dispute that insisting on compliance with the longstanding, old requirements that limit consent to a single seller and prohibit transfer of consent may impose some burdens on the businesses that have been illegally sharing consents for much of that time, as they complain.¹⁸ However, the purpose of this proceeding is to consider how to implement the TCPA, a remedial statute¹⁹ passed to protect consumers from the automated and prerecorded calls that Congress

Consumers are not the only losers when this happens; legitimate callers have a hard time completing the calls consumers do want to receive.”).

¹⁸ See Comment of Responsible Enterprises Against Consumer Harassment, CG Dockets Nos. 21-402, 02-278 (May 9, 2023), *available at* <https://www.fcc.gov/ecfs/document/10509951114134/1> (stating that the Public Knowledge 1:1 consent proposal would destroy the lead generation industry and harm both consumers and businesses); Comment of Edmond Pain & David Stodolak, Partners, Connection Holdings L.L.C., CG Dockets Nos. 21-402, 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10508986600825> (Connection Holdings is a lead generator concerned about losing business and concerned that the rules would limit other entities too strictly and put marketing companies out of business); Comments of QuinStreet, Inc., CG Dockets Nos. 21-402, 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/10509594228426/1> (stating that requiring sellers to be listed on the consent form without hyperlinks would limit consumer choice and harm businesses); Comment of Brian Harvey, Rate Simple Mortgage, CG Dockets Nos. 21-402, 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10508659620574> (stating that 1:1 consent requirement would harm the commenter’s business and the consumers it serves; listing other industries and consumers who buy from the commenter and would therefore be harmed); Comment of Corey Chandler, SBBnet, Inc., CG Dockets Nos. 21-402, 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/1050879773096/1> (Stating that the proposed 1:1 consent rule would have disastrous economic impacts on consumers and businesses, and would prevent comparison shopping sites from operating).

¹⁹ See, e.g., *Breda v. Cellco P’ship*, 934 F.3d 1, 10 (1st Cir. 2019) (citing requirement of liberal construction and declining to read a limitation into the statute); *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 656 (4th Cir. 2019) (TCPA is a remedial statute); *Parchman v. SLM Corp.*, 896 F.3d 728, 739–740 (6th Cir. 2018); *Carlton & Harris Chiropractic, Inc. v. PDR Network, L.L.C.*, 883 F.3d 459, 474 (4th Cir. 2018) (“Because the TCPA is a remedial statute, it ‘should be liberally construed and . . . interpreted . . . in a manner tending to discourage attempted evasions by wrongdoers.’”), *vacated, remanded on other grounds*, 139 S. Ct. 2051 (2019) (remanding for further consideration of weight to be given an FCC ruling on the definition of “unsolicited advertisement”); *Daubert v. NRA Group, L.L.C.*, 861 F.3d 382, 390 (3d Cir. 2017); *Van Patten v. Vertical Fitness Group*, 847 F.3d 1037, 1047–1049 (9th Cir. 2017); *Leyse v. Bank of Am.*, 804 F.3d 316, 327 (3d Cir. 2015); *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265, 271 (3d Cir. 2013) (“Because the TCPA is a remedial statute, it should be construed to benefit consumers.”).

termed a “nuisance,” and an “invasion of privacy.”²⁰ The impact of the Commission’s actions on consumers, as opposed to the impact on the callers and the telemarketing industry, is most relevant here. The Commission’s guidance that we recommend will best protect consumers from the invasive calls that the TCPA was designed by Congress to limit.

Protecting the business practices of lead generators and telemarketers should not be a primary focus of the Commission in this proceeding. But, if the Commission is nonetheless concerned about this issue, we explain in section III(C), *infra*, how the lead generator business can continue interacting with consumers as it is now doing, with the sole change impacting only the collection of consumers’ consent to receive prerecorded or telemarketing calls. We have no doubt that consumers will welcome the reduction in unwanted calls that this change will cause, and that consumers most likely will engage more freely with lead generators online.

B. The misuse of consumers’ “consents” by lead generators and others is a major factor contributing to the increasing number of illegal telemarketing calls and texts.

As we noted in our primary comments, the number of telemarketing calls has been steadily rising in recent years, peaking at over 1.3 billion a month in February 2023. Indeed, the combined number of *monthly* scam and telemarketing calls has ranged from between 2.5 and 3 billion a month (as it can be hard to tell the difference, both measures are relevant).²¹

²⁰ See Pub. L. No. 102–243, § 2, at ¶¶ 5–6, 9–10, 13–14, 105 Stat. 2394 (1991); 137 Cong. Rec. S16206 (1991) (statement of Sen. Warner in support of the TCPA) (“Indeed the most important thing we have in this country is our freedom and our privacy, and this is clearly an invasion of that...”); S. Rep. No. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973 (“The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.”). See also *Barr v. Am. Ass’n of Political Consultants, Inc.*, ___ U.S. ___, 140 S. Ct. 2335, 2344, 207 L. Ed. 2d 784 (2020) (Congress’s enactment of the TCPA “followed a torrent of vociferous complaints about intrusive robocalls. . . . Consumers were ‘outraged’ and considered robocalls an invasion of privacy. . . . In enacting the TCPA, Congress found that banning robocalls was ‘the only effective means of protecting telephone consumers from this nuisance and privacy invasion.’”); *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 650 (4th Cir. 2019) (“Congress enacted the law to protect against invasions of privacy that were harming people.”); *True Health Chiropractic Inc. v. McKesson Corp.*, 332 F.R.D. 589, 597 (N.D. Cal. 2019) (“The TCPA’s express purpose is to protect the privacy ‘right to seclusion,’ meaning the right not to be bothered, or to be left alone.”).

²¹ PR Newswire, Robocalls Top 50.3 Billion in 2022, Matching 2021 Call Volumes Despite Enforcement Efforts (Jan. 5, 2023), *available at* <https://www.prnewswire.com/news-releases/robocalls-top-50-3-billion-in-2022--matching-2021-call-volumes-despite-enforcement-efforts-301714297.html>.

Lead generators, a common feature on the internet, refer potential customers to vendors.²² The “leads”—the potential customers—are sold directly to sellers of products or services (such as lenders or insurance companies) or to lead aggregators who then sell the leads to sellers.²³ As courts and the FTC have noted, it is not always apparent from a particular website that it is operated by a lead generator rather than an actual lender or seller of other products or services,²⁴ and misrepresentations on lead generators’ sites are not uncommon.²⁵ Consumers who visit a lead generator’s site are typically invited to enter their contact information into a form or application on the site. The site operator then sells the consumer’s information to interested lenders or sellers, sometimes with some level of data analysis, and through an automated auction. A 2011 survey found that leads are sometimes sold for over \$100;²⁶ more recent online data indicates that leads can be sold for as much as \$600 each.²⁷

Several individual consumers provided comments in this proceeding illustrating how the resale of consumer data by lead generators and lead aggregators significantly contributes to the problem of illegal calls.²⁸ Additionally, R.E.A.C.H., which describes itself as an organization filing on

²² See Fed. Trade Comm’n, Follow the Lead Workshop—Staff Perspective (Sept. 2016), *available at* www.ftc.gov (overview of lead generation industry).

²³ *Id.* at 2 (“A lead is someone who has indicated—directly or indirectly—interest in buying a product.”).

²⁴ See CFPB v. D & D Mktg., 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016).

²⁵ *Id.*; Federal Trade Comm’n, Follow the Lead Workshop—Staff Perspective 5 (Sept. 2016), *available at* www.ftc.gov. See, e.g., Consumer Fin. Prot. Bureau v. RD Legal Funding, L.L.C., 332 F. Supp. 3d 729, 782–783 (S.D.N.Y. 2018); MacDonald v. CashCall, Inc., 2017 WL 1536427, at *12 (D.N.J. Apr. 28, 2017), *aff’d on other grounds*, 883 F.3d 220 (3d Cir. 2018) (affirming denial of arbitration motion); Consumer Fin. Prot. Bureau v. CashCall, Inc., 2016 WL 4820635, at *10 (C.D. Cal. Aug. 31, 2016).

²⁶ Consumer Federation of America, [Survey of Online Payday Loan Websites](http://www.consumerfed.org) 7 (Aug. 2011), *available at* <http://consumerfed.org>.

²⁷ See Leads Hook, Blog post, *How to Make Money Selling Leads in 2023 (€ How Much to Charge)* (Jan. 23, 2023), *available at* <https://www.leadshook.com>.

²⁸ See, e.g., Comments of Joe Shields, CG Docket Nos. 21-402, 02-278, at 4 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/10509289758317/1> (“[T]he ‘lead’ number is sold under the pretense of healthcare but intentionally sold to auto insurers, financial advisors, senior benefits companies, remodelers, banks, retailers, telecoms, auto warranty companies, travel companies and most importantly marketers for just about anything to name just a few.”); Comment of James Connors, CG Docket Nos. 21-402, 02-278, at 1 (Apr. 17, 2023), *available at* <https://www.fcc.gov/ecfs/document/10418203276092/1> (“[H]ere’s just three of the too numerous to count lead generation sources that create the day-in and day-out frustration to the hundreds of millions of law-abiding citizens that are bombarded daily without any concern for our privacy, while ignoring the fact that 246+ million of us have long since registered on the National Do Not Call Registry indicating we DO NOT WANT these calls!”); Comment of Richard Presley, CG Docket Nos. 21-402, 02-278, at 2 (Apr. 11, 2023), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10411157882365> (“This is exactly why the [lead generation] industry has never followed the

behalf its “direct-to-consumer marketing, lead generation and performance marketing members,” admitted in its comments that lead generators are responsible for a “meaningful percentage” of entirely fabricated consent agreements.²⁹ R.E.A.C.H.’s comments provide particularly helpful information about how the lead generator industry works to facilitate telemarketing robocalls. Its comments explain that “once the consumer has submitted the consent form the company seeks to profit by reselling the “lead” multiple—perhaps hundreds—of times over a limitless period of time. Since express written consent does not expire, the website is free to sell the consent forever.”³⁰

R.E.A.C.H.’s comments point out that lead generators and aggregators may sell the record of a consumer’s consent to receive calls from one seller to “multiple buyers . . . (or) to other aggregators who hope that they can sell the [consent to be called] to others within its network.”³¹ And, once the consumer has submitted the online consent form, the lead generator will resell that “lead” (including the consent form) multiple times—perhaps hundreds of times—over a limitless period.³² Each party that owns the consent, including the original lead generator and every subsequent purchaser of the consent, “is free to sell it again.”³³

The result of all these sales: “Each time the website operator—or an intermediary “aggregator” . . . sells the consumer’s data a new set of phone calls will be made to the consumer.”³⁴

Additional comments in this proceeding support the point that the practice of lead generators sharing consents is a major contributing factor in the proliferation of unwanted telemarketing calls:

- The known fact that one click can sign up a consumer to thousands of businesses, related or not, is a dreadful problem. Aged leads are also problematic because, currently, consent never

rules and nor will it ever police itself. . . .”); Anonymous Comment, CG Docket Nos. 21-402, 02-278 (Feb. 27, 2023), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10224111809296> (“It’s the aged data companies that are raking in 500% profit reselling the same consumer data 5 or more times to small businesses who don’t know any better about the TCPA to begin with.”).

²⁹ Comment of Responsible Enterprises Against Consumer Harassment, CG Dockets Nos. 21-402, 02-278, at 1 (May 9, 2023), available at <https://www.fcc.gov/ecfs/document/10509951114134/1>.

³⁰ *Id.* at 3 (emphasis added).

³¹ *Id.* at 6.

³² *Id.* at 3 (emphasis added).

³³ *Id.* at 6 (emphasis added).

³⁴ *Id.* at 3 (emphasis added).

expires.³⁵

- Until lead buyers stop purchasing non-compliant leads there will be incentives that lead to bad practices.³⁶

On the other hand, comments from the telemarketing industry and lead generators defend the sharing of consumer consents with hundreds, and even thousands, of callers:

- A trade association for callers—PACE—argues against the Commission’s proposal in the NPRM: “It is easy to say that 1,000 companies are too many but there are many markets, such as insurance, where hundreds of relevant companies provide differentiated products.”³⁷
- Connection Holdings, a lead generator said: “The two main areas of concerns are limiting the number of partners too strictly, as well [as] eliminating marketing companies like ours from providing services. The partner link shouldn’t have 5000 companies on it, but our view is that should in fact have hundreds. We sell to hundreds of small solar companies for instance. Many small business owners only cover 20-50 zip codes. Since we market to over 20,000 zip codes, there are indeed hundreds of companies represented within this scope.”³⁸

Clearly, the Commission’s elimination of this sharing of online consent forms will radically reduce the number of telemarketing calls made in the U.S.

C. Prohibiting lead generators from sharing telemarketing consent forms will still permit lead generators to provide helpful services to consumers and businesses.

Regardless of the hysteria emanating from the lead generator industry about what the industry refers to as potentially devastating anti-consumer impacts of the proposed action by the Commission, there will really be only a limited impact. Lead generators will not be able to obtain a consumer’s consent to receive prerecorded or telemarketing calls through a single agreement that applies to multiple potential callers, and they will not be able to sell or transfer a consumer’s consent to others besides the identified seller. However, lead generators will still be able to enable

³⁵ Comment of Drips, CG Dockets Nos. 21-402, 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/10509043191182/1>.

³⁶ Comment of National Association of Mutual Insurance, CG Dockets Nos. 21-402, 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/10508029328611/1>.

³⁷ Comment of Professional Associations for Customer Engagement, CG Dockets Nos. 21-402, 02-278, at 9 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/1050879833281/1>.

³⁸ Comment of Edmond Pain & David Stodolak, Partners, Connection Holdings L.L.C., CG Dockets Nos. 21-402, 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10508986600825>.

consumers' consent to receive calls. Compliance with the FCC's rules will simply mean that consumers understand and give true, knowing consent to receive calls from particular sellers. When the regulations require that consent be in the form of an agreement between the consumer and the seller (as required for calls to DNC lines), a lead generator that is an agent of the seller can obtain the consumer's consent on behalf of the seller. And, a lead generator that is not an agent can refer the consumer directly to the seller's website to give consent directly to the seller.

All of the other information that lead generators provide to consumers, including direct referrals to sellers of products and services through weblinks, is unaffected by compliance with the FCC's rules. And nothing prohibits lead generators from providing the offered referrals through email or snail mail (addresses are often required information), or even by simply displaying the information right on the website. Many lead generators currently do not require the entry of a telephone number to refer a consumer to a seller,³⁹ and others ask for minimal information (like zip code) and then refer the consumer right to a seller's website.⁴⁰

We, representatives of a broad swath of U.S. telephone consumers, are confident that the limitation imposed on the activities of lead generators that will result from the Commission's confirmation of its current regulations will be wholeheartedly welcomed by all U.S. telephone subscribers.

IV. Conclusion

We urge the Commission to reiterate the requirements that it imposed on telemarketers in 2003 and 2012, and protect consumers from the ongoing proliferation of these intrusive calls.

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³⁹ See, e.g., <https://www.google.com/travel/flights>.

⁴⁰ See, e.g., <https://best.ratepro.co/>; <https://www.esurance.com/>; www.nerdwallet.com.